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No. 33.

# Supreme Court of the United States.

OCTOBER TERM, 1952.

LOUIS K. NATHANSON, TRUSTEE IN BANKRUPTCY OF MACKENZIE COACH LINES, INC., *Petitioner*,

*v.*

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

IN THE MATTER OF

MACKENZIE COACH LINES, INC., BANKRUPT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF FOR THE PETITIONER.

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IN THE MATTER OF

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF FOR THE PETITIONER.

### Opinions Below.

The order of the referee in bankruptcy (R. 121) is unreported. The opinion of the District Court for the District of Massachusetts is reported in 100 F. Supp. 489. The opinion of the Court of Appeals for the First Circuit is reported in 194 F. 2d 248.

## Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on February 11, 1952. The petition for a writ of certiorari was filed in the Supreme Court on March 27, 1952, and was allowed on June 2, 1952. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. sec. 1254(1).

## Questions Presented.

(1) Whether a referee in bankruptcy may properly require the computation of a National Labor Relations Board back pay award against a bankrupt employer to be made in the Bankruptcy Court.

(2) Whether a back pay award of the National Labor Relations Board, after computation thereof, is entitled to a priority under section 64a(5) of the Bankruptcy Act, 11 U.S.C. sec. 104(a)(5), as a debt owed to the United States.

## Specification of Errors to be Urged.

The Court of Appeals erred:

(1) In ordering the matter to stand in abeyance in the Bankruptcy Court to permit the Board to fix the precise amount owed on account of the back pay.

(2) In ruling that the claim of the National Labor Relations Board is entitled to priority as a debt owed to the United States under section 64a(5) of the Bankruptcy Act, 11 U.S.C. sec. 104(a)(5).

(3) In affirming the order of the District Court.

## Statutes Involved.

The pertinent statutory provisions are printed in the Appendix, *infra*, pp. 36-39.

## Statement of the Case.

MacKenzie Coach Lines, Inc. (herein called MacKenzie), on complaint and hearing before the National Labor Relations Board, was found to have engaged in unfair labor practices under the National Labor Relations Act, 29 U.S.C. secs. 151 *et seq.*, and was ordered on February 4, 1948, among other things, to "make whole" six designated employees "for any loss they may have suffered" thereby. (R. 5, 7, 9.)

After entry of the Board's order an involuntary petition in bankruptcy was filed against MacKenzie on June 7, 1948. (R. 125, 137.) MacKenzie was duly adjudicated a bankrupt thereon and the petitioner was duly appointed trustee in bankruptcy of its estate and has duly qualified and is acting as such.

After the adjudication, the Board, on November 18, 1948 (R. 25, 26, 33), filed in the Court of Appeals for the First Circuit a petition for the enforcement of its order. The petitioner appeared specially. (R. 11.) On December 7, 1948, the Court of Appeals entered a decree of affirmance and enforcement. (R. 10, 11.)

Thereafter, on March 15, 1949 (R. 112), the Board filed a proof of claim with the referee in the name of the Board. As later amended, the proof asserted the Board's right to back pay allowances "in upwards of the sum of $4,463.69" claimed to be due to five of the employees, setting out the name of each of the five and the amounts claimed for four of them. (R. 2, 13.) (No amount was stated for the fifth employee, the claim stating with respect to him: "Not yet located, hence unable to compute." (R. 13.)) The proof of claim further stated that the ". . . obligation is entitled to priority as a wage claim to the extent that back pay not exceeding the sum of $600.00 accrued to each employee during the period of three months before commencement of

this proceeding, and the remainder of said obligation is entitled to priority as a debt owing to the United States." (R. 4.)

The amounts set forth as owing to the four employees for whom figures were submitted were arrived at by the Board without holding any hearing thereon and without the participation of the petitioner or of MacKenzie. (R. 23, 39, 40, 78, 96, 127.)

At a hearing held before the referee upon the allowance of the Board's proof of claim, the Board refused to introduce any evidence showing how its figures had been arrived at, the Board taking the position that the computation of back pay was not within the Bankruptcy Court's jurisdiction but was rather within the exclusive jurisdiction of the Board. (R. 22, 40, 95, 103, 105.) The Board also refused to introduce evidence showing that the employees were the employees of MacKenzie, the Board's position being that the enforcement decree of the Court of Appeals was conclusive in that respect. (R. 86, 88, 89.)

After hearing and consideration of the proof of claim, of the evidence presented and of the arguments of counsel, the referee disallowed the claim (R. 121), ruling and finding that the employees were not the employees of MacKenzie, that the Board's claim was not a liquidated claim and had never been legally liquidated. (R. 128.)

On the Board's petition for review, the judge of the District Court set aside the referee's disallowance of the Board's claim and ordered the referee to permit the matter to stand in abeyance for two months to permit the Board to fix the precise amount owing on account of the back pay and to file with the referee an amendment to its claim showing such amount. (R. 139.) The judge of the District Court ruled that the Board's claim was entitled to priority as a debt owing to the United States under section 64a(5) of the Bankruptcy Act. (R. 139.)

The Court of Appeals, on appeal of the petitioner, affirmed the order of the judge of the District Court.

## Summary of Argument.

### Point I.

A referee in bankruptcy may properly require the liquidation of a National Labor Relations Board back pay award against a bankrupt employer to be made in the Bankruptcy Court.

A. The Board voluntarily submitted itself to the jurisdiction of the Bankruptcy Court by filing its proof of claim.

B. Section 57d of the Bankruptcy Act, 11 U.S.C. sec. 93(d), expressly leaves the manner of liquidation of an unliquidated claim, such as a National Labor Relations Board back pay award, to the discretion of the Bankruptcy Court (here the referee).

C. The Board may not, as of right, require the liquidation of the back pay award to be referred to it.

(1) Yielding to the Board's demand would deprive a Bankruptcy Court of one of its most characteristic functions (the allowance and liquidation of claims) and would impede the speedy disposition of a bankruptcy proceeding.

(2) No provision of the National Labor Relations Act expressly, or by implication, supports the Board's position.

(3) No question of the Board's expertise is presented.

(a) The computation of a back pay award is simply an application of the traditional measure of compensatory damages to an unlawfully discharged employee.

(b) In the present case, especially, no complexities calling for the Board's expertise are involved.

(4) The cases relied on by the Board are inapposite. They deal principally with railroad reorganizations which are governed by a special statutory scheme expressly providing for the primary and exclusive jurisdiction of the Interstate Commerce Commission in complex railroad matters substantially affecting the public interest.

D. The referee's disallowance of the claim should not be disturbed.

## Point II.

A back pay award of the National Labor Relations Board is not entitled to priority under section 64a(5) of the Bankruptcy Act, 11 U.S.C. sec. 104(a)(5), as a debt owed to the United States.

A. A back pay award of the National Labor Relations Board is not the kind of matter which is provable in bankruptcy.

(1) The claim of the Board is not provable as a fixed liability, as evidenced by a judgment absolutely owing at the time of the filing of the petition within the meaning of section 63a(1) of the Bankruptcy Act, 11 U.S.C. sec. 103(a)(1).

(2) The claim of the Board is not provable as a debt founded upon a contract express or implied within the meaning of section 63a(4) of the Bankruptcy Act, 11 U.S.C. sec. 103(a)(4).

B. If, however, a back pay award of the National Labor Relations Board is provable in bankruptcy, it is entitled to priority only under section 64a(2) as wages, and not under section 64a(5) as a debt owed to the United States.

(1) Back pay does not differ from other pay and is in fact paid as wages.

(2) The determination of the question is controlled by the specific provision of section 64 of the Bankruptcy Act, 11 U.S.C. sec. 104, granting the wage priority.

(a) The specific statutory priority provision applicable to wages must prevail over the general priority provision applicable to debts owed to the United States.

(1) A special provision in a statute will prevail over a general provision which, in the absence of the special provision, would control.

(2) Many precedents apply the foregoing rule to bankruptcy cases involving wage and other priorities.

(3) Apart from the foregoing rule of statutory construction, the back pay award is not a debt owed to the United States.

(a) No "public right" is involved.

(1) The term "public right", as properly used, merely describes a result but does not provide a key to the solution of a problem.

(2) Only where questions arise concerning the Board's jurisdiction or its administration of the National Labor Relations Act is there a "public right", so called, involved.

(3) In cases where there is no encroachment on the Board's authority, the label of "public right" is irrelevant and has been disregarded.

(4) In the instant case the denial of the Board's claim to a governmental priority will not encroach on the Board's authority. Therefore, the question of what priority should be accorded the claim is a question not of labor relations

law, but of bankruptcy law, to be determined in accordance with accepted principles of interpretation of the Bankruptcy Act.

(b) The filing of a proof of claim by a governmental agency in bankruptcy proceedings does not necessarily require that the claim be given a priority as a debt owed to the United States.

(c) To be entitled to the governmental priority the claim must satisfy the purpose of R.S. 3466, 31 U.S.C. sec. 191, to protect the public revenue.

(1) A back pay award does not come within the purpose of R.S. 3466 to protect the public revenue and does not inure to the financial benefit of the United States.

(2) *Bramwell* v. *United States Fidelity & Guaranty Co.*, 269 U.S. 483, involving the funds of Indian tribes is unique and not in point.

(3) Reading R.S. 3466 together with the Bankruptcy Act emphasizes the conclusion that the back pay award is not entitled to a governmental priority.

(*a*) Conferring a governmental priority on the Board's claim will defeat the purpose of the Bankruptcy Act to treat all wage claims equally.

(*b*) Only by denying a governmental priority to the back pay award can the purposes of the Bankruptcy Act and the National Labor Relations Act be harmonized.

(*c*) The rights of general unsecured creditors should not be disregarded by the intrusion of a novel priority into the Bankruptcy Act.

## Conclusion.

The judgments below should be reversed.

## Argument.

### I.

### A REFEREE IN BANKRUPTCY MAY PROPERLY REQUIRE THE LIQUIDATION OF A NATIONAL LABOR RELATIONS BOARD BACK PAY AWARD AGAINST A BANKRUPT EMPLOYER TO BE MADE IN THE BANKRUPTCY COURT.

The Board voluntarily submitted itself to the jurisdiction of the Bankruptcy Court by filing its proof of claim with the referee in bankruptcy. *Gardner* v. *New Jersey*, 329 U.S. 565, 573, 574; *New York* v. *Irving Trust Co.*, 288 U.S. 329; *Clark* v. *Barnard* 108 U.S. 436, 447. "It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court . . . must abide the consequences of that procedure." *Gardner* v. *New Jersey*, *supra*, p. 574. ". . . otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated." *New York* v. *Irving Trust Co.*, *supra*, p. 333.

That the Board is a governmental agency in no way affects the treatment to be accorded it with respect to the liquidation of its proof of claim. Governmental and private creditors are subject to the same requirements. *Gardner* v. *New Jersey*, 329 U.S. 565, 573.

The Bankruptcy Act expressly leaves the manner of liquidation of an unliquidated claim, such as a back pay award, entirely to the discretion of the Bankruptcy Court.[1] Section 57d of the Bankruptcy Act, 11 U.S.C. sec. 93(d), provides in pertinent part:

> ". . . That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof

[1] By definition "court" includes the referee. Section 1(9) of the Bankruptcy Act, 11 U.S.C. 1(9), states: " 'Court' shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending."

estimated in the manner and within the time directed by the court; . . ."

It is for the referee to determine whether he himself should proceed to liquidate the claim or whether he should refer it to another tribunal (here the Board) for liquidation. ". . . no particular reason need be present to entitle the bankruptcy court to proceed to liquidation in its own forum." 3 Collier Bankruptcy (14th Ed.), sec. 57.15, p. 208.

The Board may not, as of right, require that the liquidation of the back pay award be referred to it. To deny the referee jurisdiction to liquidate the award and to yield to the Board's claim of exclusive jurisdiction would deprive the Bankruptcy Court of one of its most traditional and characteristic functions: the consideration and allowance or disallowance of the claims filed against the estate of the bankrupt (including the manner of liquidation of such claims when necessary). Congress has expressly entrusted this function solely to the Court. ". . . the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and . . . such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, . . ." *U.S. Fidelity & Guaranty Co.* v. *Bray*, 225 U.S. 205, 217.

"A distinct purpose of the Bankruptcy Act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy. Creditors are entitled to have this authority exercised, and justly may complain when, . . . , an important part of the administration is sought to be effected . . . in another court, . . ." Id. p. 218.

The Board, however, while conceding that this may be the principle applicable to "ordinary unliquidated claims," urges, nevertheless, that the principle is not applicable to claims "for which Congress prescribed a special and exclusive tribunal." (Brief for the National Labor Relations Board in Opposition to Petition for Writ of Certiorari, footnote, p. 9.) The Board claims to be such a tribunal for the purpose of liquidating the proof of claim which it has filed with the Bankruptcy Court. (R. 95, 103, 105.)

If Congress has, indeed, vested the Board with such jurisdiction, it is not self-evident from the express language of the National Labor Relations Act itself. Nor does the Board purport to find such power in any express and specific grant in that statute. Rather it appears to rest its position on the assertion that it is within its particular competence and knowledge to compute a back pay award in effectuating the purposes of the National Labor Relations Act.

The Board argues that the computation of the back pay award involves questions of fact and law arising in a highly specialized field and calling for the expert knowledge and experience of the Board. Specifically it asserts that the question of whether any of the employees have wilfully incurred losses of earnings by unjustifiably refusing employment during the period following their discharge is a highly technical concept, unique to the field of labor relations, which has developed in a small body of decisions under the National Labor Relations Act. It states that it has built up a body of law dealing with other problems connected with the computation of back pay involving the question whether and to what extent an employee's earnings upon his own farm are deductible as interim earnings, and whether an employee by engaging in business for himself rather than seeking employment elsewhere has so

withdrawn himself from the labor market as to cut off the further accumulation of back pay.

Is not the Board by this argument, however, overemphasizing its own expertise and underestimating the competence of the Court?[2] What is more characteristic of the daily work of a court than the assessment of damages? This Court has laid down a simple and workable standard to be used in computing a back pay award, stating, ". . . employees may be reimbursed for earnings lost by reason of the wrongful discharge, from which should be deducted net earnings of employees from other employment during the back-pay period, . . . and also sums which they failed without excuse to earn, . . .". *National Labor Relations Board* v. *Gullet Gin Co.*, 340 U.S. 361, 363.

That is the usual gauge applied by a court in breach of contract actions to determine the damages due a wrongfully discharged employee. ". . . in an action by the employee against the employer for a wrongful discharge, a deduction of the net amount of what the employee earned, or what he might reasonably have earned in other employment of like nature, from what he would have received had there been no breach furnishes the ordinary measure of damages." Williston, Contracts (Rev. Ed.), sec. 1358, p. 3811. "If the employee, after vainly seeking other employment, works on his own account, and thereby receives some profit, this also should be deducted if the work could not have been done had the original contract remained in force." Id. sec. 1359, p. 3814. It is difficult to see how the Bankruptcy Court in applying this rule of damages in a bankruptcy proceeding to an award which has been made by the Board in a labor proceeding would be interfering with the Congressional pur-

[2] This is not the first time that the Board may have overestimated the difficulties in the computation of a back pay award. See *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 198.

pose of vesting administration of the National Labor Relations Act in the Board.

The cases relied on by the Board in support of its position that it is vested with exclusive jurisdiction to liquidate a back pay award are inapposite. They are of three classes: (1) enforcement proceedings by the Board itself, in no way involving the jurisdiction of the Bankruptcy Court, where the Board is, of course, held empowered to liquidate its own award—see *National Labor Relations Board* v. *Bird Machine Co.*, 174 F. 2d 404 (C.A. 1), and *National Labor Relations Board* v. *New York Merchandise Co.*, 134 F. 2d 949, 952 (C.A. 2); (2) a railroad reorganization proceeding "involving unsettled questions of state property law arising in the course of bankruptcy administration." *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478, 483; and (3) cases involving competing claims to jurisdiction by the Bankruptcy Court and by an administrative body, other than the Board, and dealing with situations where the Court was faced with complicated technical problems, wholly foreign to its own experience, and widely and substantially affecting the public interest, and where, as in the field of railroad reorganizations, Congress may not have given the Court the same scope as it has in dealing with other situations. See *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422; *Smith* v. *Hoboken Railroad &c. Co.*, 328 U.S. 123, and *Thompson* v. *Texas Mexican Railway Co.*, 328 U.S. 134.

Thus *Smith* v. *Hoboken Railroad &c. Co.*, 328 U.S. 123, involved a reorganization proceeding under section 77 of the Bankruptcy Act (Reorganization of Railroads Engaged in Interstate Commerce). The major part of the debtor railroad's right of way and line of railroad was held by it under a lease. The lessor desired to have the Bankruptcy Court enforce the forfeiture provisions contained in the lease. It was held that the Court should stay its hand pending

a determination of the question by the Interstate Commerce Commission. The Court stated (pp. 130, 132, 133): "It is the function of the Commission under § 77 to prepare the plan of reorganization of the debtor company. § 77(d) . . . As we stated in *Palmer* v. *Massachusetts*, 308 U. S. 79, 87, 'The judicial process in bankruptcy proceedings under § 77 is, as it were, brigaded with the administrative process of the Commission.' . . . If forfeiture of leases can be decreed without prior reference of the matter to the Commission, it may be seriously embarrassed in preparing the plan which it deems necessary or desirable for the reorganization of the debtor [5]."

"[5] *Finn* v. *Meighan*, *supra*, involved the forfeiture of a lease in reorganization proceedings under Ch. X. But the problem there was not complicated by any provisions of Ch. X giving to an administrative agency the functions entrusted to the Interstate Commerce Commission under § 77. As we stated in *Palmer* v. *Massachusetts*, 308 U. S. 79, 87, '. . . the whole scheme of § 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates.'" [The foregoing is a footnote appearing in *Smith* v. *Hoboken Railroad & Co. Co.* at page 133.]

Only such extraordinary situations would warrant the failure to implement the fundamental requirement of speed [3] in bankruptcy administration. Such referral might well open the door to protracted judicial review of the decision of the administrative agency,[4] and thus deprive all the other creditors of the estate of the "final settlement and distribution in a summary way" which it is the "distinct purpose of the Bankruptcy Act" to effect through Courts of Bankruptcy. *United States Fidelity & Guaranty Co.* v. *Bray*, 225 U.S. 205, 218.

By contrast with such cases, the determination of the amount of a back pay award should be a relatively simple

[3] *Bailey* v. *Glover*, 21 Wall. 342, 346; *Jenkins* v. *International Bank*, 106 U.S. 571, 575; *West Coast Const. Co.* v. *Nelson*, 77 F. 2d 754 (C.A. 5).

[4] See *Far East Conference* v. *United States*, 342 U.S. 570, 577.

matter. There is no suggestion of great technical complexity in the computation. Nor does the matter present any problem not within the conventional experience of the Court and requiring the specialized administrative discretion of the Board. The application of the measure of damages by the Court is a customary incident of its daily routine. Such specialized administrative discretion as is called for has already been fully exercised by the Board in arriving at its award of back pay as a remedy for the unfair labor practice complained of. *International Union of Mine, Mill & Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.* 325 U.S. 335, 341.

Accordingly, when the referee insisted on the Bankruptcy Court as the forum for the liquidation of the back pay award, he was acting wholly within the bounds of sound judicial discretion. Whether he was also correct in his ruling (R. 128) that he was not bound by the Board's determination that the employees involved were employees of the bankrupt need not be considered.[5] The refusal of the Board to liquidate its claim in the Bankruptcy Court was sufficient ground for disallowance. Other grounds are thereby rendered immaterial.

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[5] The referee was clearly correct so far as his position may be construed as holding that the definition of an employee within section 2(3) of the National Labor Relations Act, 29 U.S.C. sec. 152(3), was not controlling in determining the class of wage earners entitled to priority within section 64a(2) of the Bankruptcy Act, 11 U.S.C. sec. 104(a)(2). See *Lane* v. *Railroad Retirement Board*, 185 F. 2d 819 (C.A. 6). The referee's insistence on his right to determine whether the employees worked for the bankrupt may also be justified on the ground that the Board's order was merely provisional as of the date of the commencement of the bankruptcy proceedings and was for that reason alone not entitled to be treated as res judicata. (See Restatement of Judgments, sec. 41, and section 10(d) of the National Labor Relations Act, 29 U.S.C. sec. 160(d), and "Developments In The Law—Res Judicata," 65 Harv. L.R. 818, 867.)

## II.

### A BACK PAY AWARD OF THE NATIONAL LABOR RELATIONS BOARD IS NOT ENTITLED TO PRIORITY UNDER SECTION 64a(5) OF THE BANKRUPTCY ACT AS A DEBT OWED TO THE UNITED STATES.

*A: A back pay award of the National Labor Relations Board is not the kind of claim which is provable in bankruptcy.*

Not all obligations of a bankrupt may be proved and allowed against his estate. Only the kind of debts specified in section 63a of the Bankruptcy Act are provable in bankruptcy. Sec. 63a—Debts which may be Proved—provides in pertinent part as follows:

> "Debts [6] of the bankrupt may be proved and allowed against his estate which are founded upon
> "(1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him . . .
>
> . . . . . .
>
> "(4) an open account, or a contract express or implied . . ."

The lower courts in the instant case held that the Board could prove its claim as a "judgment" within the meaning of section 63a(1). The Court of Appeals in *National Labor Relations Board* v. *Killoren*, 122 F. 2d 609 (C.A. 8) (cert. den. 314 U.S. 696), held that the order of that Court affirming the back pay award created a debt founded upon a contract express or implied within the meaning of section 63a(4). It is the position of the petitioner that the claim of the Board is not provable under either of these provisions.

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[6] Sec. 1(14) of the Bankruptcy Act defines "debt" as follows: "'Debt' shall include any debt, demand, or claim provable in bankruptcy."

*The claim of the Board is not provable as a judgment.* The provability of claims depends on their status at the time of the filing of the petition in bankruptcy. *Brown* v. *O'Keefe*, 300 U.S. 598, 603; *Zavelo* v. *Reeves*, 227 U.S. 625, 631; Bankruptcy Act, sec. 63, 11 U.S.C. sec. 103. In the instant case the Board's order awarding back pay preceded the date of the filing of the bankruptcy petition against the employer, but its petition to the Court of Appeals for the affirmance and enforcement of its order was not filed with that Court until some five months after the filing of the bankruptcy petition, and the Court of Appeals' decree of enforcement was not entered until still three weeks later. (R. 16, 25, 26, 33.) If, therefore, the Board's claim is to be proved as a judgment, the proof must perforce be predicated upon the unconfirmed order of the Board made prior to the filing of the petition in bankruptcy. Such an order, however, is not a judgment. Cf. *Lane* v. *Industrial Commissioner*, 54 F. 2d 338 (C.A. 2) (cert. den. 286 U.S. 543), where an award by a workmen's compensation commission was held not provable under the Bankruptcy Act prior to the amendment of the act (section 63a(6) specifically making such awards provable).[7] See Note, 40 Columbia L.R. 1272. See also Note, 55 Harv. L.R. 539, 540.

Neither was the Board's order a "fixed liability . . . absolutely owing at the time of the filing of the petition." Nothing was "fixed" and no "liability" "absolutely

[7] It should be noted that the amendment to the Bankruptcy Act making the award of an industrial accident commission provable in bankruptcy dealt specifically and exclusively with such an award. It did not speak of the award of any other kind of administrative body, nor of a more inclusive order ". . . by a quasi-judicial agency . . . enforceable in an appellate court," the ground upon which the District Court judge rested his decision as to provability in the instant case. (R. 137-138.) Should not the plea of the Board for the provability of its award be addressed to Congress rather than to the Court?

owing" was created until the entry of the decree in the Court of Appeals affirming the order of the Board and directing its enforcement after the filing of the petition in bankruptcy. Until a transcript of the record was filed in its proceedings in the Court of Appeals the Board itself had full authority to modify or set aside the back pay order. Sec. 10(d) of the National Labor Relations Act, 29 U.S.C. sec. 160(d). *In the Matter of N.L.R.B.*, 304 U.S. 486, 495. *Ford Motor Co.* v. *N.L.R.B.*, 305 U.S. 364, 370. *Cf. International Union* v. *Eagle-Picher Mining &c. Co.*, 325 U.S. 335. The Court of Appeals exercises an independent function in affirming and ordering the enforcement of a back pay award. *May Department Stores Co.* v. *N.L.R.B.*, 326 U.S. 376; *N.L.R.B.* v. *Eanet*, 179 F. 2d 15 (C.A. D.C.). "The validity of the Board's allowance of back pay and the enforcibility thereof were conclusively settled by our order affirming it and directing its enforcement. . . . *The order of this Court, affirming and directing payment of the back pay award, stamped it with finality as a definite and enforcible obligation against the employer.* 29 U.S.C.A. Sec. 160(e); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48, 49; *In the Matter of N.L.R.B.*, 304 U.S. 486, 495. From that time on at least, it became for all applicable legal purposes, a retroactive and accumulating 'indebtedness due to the Board for and on behalf of the . . . employees.' *N.L.R.B.* v. *Carlisle Lumber Co.*, 9 Cir., 108 F. 2d 188, 189." *N.L.R.B.* v. *Killoren*, 122 F. 2d 609, 612 (C.A. 8). (Emphasis supplied.)

*The claim of the Board is not provable as a debt founded upon a contract express or implied.* The *Killoren* case, *supra*, held (p. 612) that, *after* the affirmance of the Board's back pay award by the Court of Appeals, the award "was an indebtedness arising out of an obligation imposed by statute; hence was quasi-contractual in nature; constituted

therefore a claim on an implied contract under section 63a(4) of the Bankruptcy Act; and so was a provable debt in bankruptcy." Some statutory obligations have been held provable as "implied contracts," but on the theory that there was an underlying contractual relationship between the parties upon which the additional legal duty was impressed. Thus in *Brown* v. *O'Keefe*, 300 U.S. 598, cited by the Court in the *Killoren* case, the statutory liability of a stockholder of an insolvent national bank was allowed to be proved in his bankruptcy proceedings.

Certainly there was no such relationship here. "The power of the Board to issue a back pay order is not based on the breach of any contract of employment between employer and employee. See *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 267 (1940); *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350, 362, 363 . . . Nor can any underlying contractual relationship between the employer and the Board itself be perceived. The Board's remedy for the collection of back pay lies in the contempt power of the Circuit Court of Appeals. See *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, supra, at 270." Note, 40 Columbia L.R. 1272, 1273, footnote 11. The inapplicability of the implied contract theory becomes even more apparent when it is noted that back pay awards may be entered not only against employers but also against unions which have been responsible for the dismissal of the aggrieved employees. National Labor Relations Act, sec. 10(c), 29 U.S.C. sec. 160(c).[8]

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[8] The dubiousness of resting provability on the theory of implied contract is emphasized by the action of the District Court judge in departing from his own prior approval of it in an earlier case (*Matter of Shawsheen Dairies, Inc.*, 47 F. Supp. 494, 496, 497 (D.C. Mass.)), and in resting provability on the theory of judgment in the instant case.

*B. If, however, a back pay award of the National Labor Relations Board is provable in bankruptcy, it is entitled to priority under section 64a(2), as wages, and is not entitled to priority under section 64a(5), as a debt due to the United States.*

*The position of the Board.* The priority accorded by Congress to workmen for wages earned under section 64a(2) is a limited one, both as to the amount payable to each claimant and as to the time within which the wages must have been earned, section 64a(2) providing, in pertinent part:

> "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be
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> . . . . . .
>
> "(2) wages, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding . . ."

It is the position of the Board that its back pay award is entitled not only to priority under section 64a(2), as wages, in so far as the limitations of that section permit, but also to a priority under section 64a(5), as a debt due to the United States, for the remainder of the award which is unsatisfied because of the limitations of the priority accorded to wages by Congress under section 64a(2). (R. 4, 15, 95.) The Board says in essence that any such unsatisfied remainder of the award should not be relegated to being proved against the estate as a claim in competition with all other general creditors, but should be accorded an additional and further unlimited priority, as a debt due to the United States, so that the workmen in whose favor the award has been made may be paid in full before any payment whatever is made to general creditors of the bankrupt.

*The position of the petitioner.* It is the position of the petitioner that, if a back pay award is a provable debt, it is

entitled to priority as wages, and solely as wages, under section 64a(2); it is not entitled to any further priority whatever as a debt due to the United States, under section 64a(5).

*The nature of a back pay award.* There is no dispute between the petitioner and the Board as to whether a back pay award should be given a wage priority under section 64a(2). Both parties agree that it should. Any doubts that may have been entertained as to that issue have been effectively quieted by the unanimous decision of this Court in *Social Security Board* v. *Nierotko*, 327 U.S. 358, holding that back pay should be treated as wages under the Social Security Act. The Court there declared that back pay does not differ from other pay (p. 368), "is in fact paid as wages" (p. 371), and "should be allocated to the periods when the regular wages were not paid as usual" (p. 370). It cited with approval (note 20, p. 368) the view of the Court of Appeals for the Eighth Circuit in *N.L.R.B.* v. *Killoren*, 122 F. 2d 609, 614, that in bankruptcy a back pay award is entitled to priority as a wage claim. The issue in the present case, therefore, resolves itself simply to the question of whether, in addition to the limited wage priority to be granted a back pay award under section 64a(2), there should also be granted a further unlimited general priority under section 64a(5).

*The applicable rule of statutory construction.* It is, of course, the Bankruptcy Act which fixes priorities. The *specific* provision in that act for a priority for wage claims (sec. 64a(2)) excludes the applicability to wage claims of a *general* priority provision also contained in the act (sec. 64a(5)). This follows from applying to the Bankruptcy Act a fundamental rule of statutory construction. As phrased by this Court: "It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same

or another statute which might otherwise prove controlling." *Kepner* v. *United States*, 195 U.S. 100, 125.

This is a rule of construction heretofore often applied by the federal courts to claims for wage priorities under the Bankruptcy Act. Prior to its amendment in 1938, the general priority provision of that act[9] (under which, as amended, the Board is now claiming a further unlimited priority in addition to the wage priority) provided for priority to "debts owing to any person who by the laws of the States or the United States is entitled to priority . . ." The state statutes often provided for a greater and less limited wage priority than has Congress in the Bankruptcy Act. It was therefore argued in behalf of workmen claiming priority that their claim should be governed by the general priority provision pertaining to "debts owing to any person who by the laws of the States . . . is entitled to priority" (now, as amended, sec. 64a(5)), rather than by the more limited wage priority provision (now sec. 64a(2)). This argument was rejected.

The two leading Court of Appeals cases are *In re Rouse, Hazard & Co.*, 91 Fed. 96 (C.A. 7), and *In re Slomka*, 122 Fed. 630 (C.A. 2). In the *Slomka* case (where, incidentally, no wages were earned during the three months prior to bankruptcy) the Court declared (p. 631): "No principle of statutory construction is better settled than that which displaces the application of general provisions to a particular subject where there are specific provisions applicable to it in the same act. The subject of claims for wages is specifically regulated by clause 4, and its provisions express the particular intent of Congress regarding priority for such claims. As these confine the priority to wages earned within three months before the commencement of the bankruptcy proceeding, debts like the present are not

[9] At that time sec. 64b(7).

included" (p. 631). In the *Rouse, Hazard* case, where the Court held that the sole foundation for a priority claim for wages was the specific wage priority provision of the Bankruptcy Act, the Court said (p. 101): "Our conclusion is that congress having spoken specifically to the subject of priority of payment of labor claims, what it has said upon the subject expresses the particular intent of the lawmaking power, and that provision is not to be tolled or enlarged by any general or subsequent provision in that act. That which is given in particular is not affected by general words."

The *Slomka* and the *Rouse, Hazard* cases have been generally followed by other federal courts.[10] Thus in *In re Unit Lock Co.*, 49 F. 2d 313, 316 (U.S. D.C. N.D. Okla.), the Court stated: "When a special provision is made, it displaces the application of a general provision to the particular subject which is treated in the specific provision. The subject of claims for wages is specifically regulated by the Bankruptcy Act . . . and its provisions express the intent of the legislative body enacting it with respect to priority of such claims. The general provision, allowing priority for debts owing to any person who, by the laws of the states or the United States, is entitled to priority, must be limited to those which are not included in specific provisions of the act."

Both the *Slomka* and the *Rouse, Hazard* cases have been cited by this Court as authority for the rule of construction which they apply.[11] In *Missouri* v. *Ross*, 299 U.S. 72, 76,

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[10] *In re Shaw*, 109 F. 782 (U.S. D.C. E.D. Pa.); *In re Crown Point Brush Co.*, 200 F. 882, 889 (U.S. D.C. N.D. N.Y.); *In re Crawford Wollen Co.*, 218 F. 951, 955 (U.S. D.C. N.D. W.Va.); *In re Caledonia Coal Co.*, 254 F. 742, 747 (U.S. D.C. E.D. Mich. N.D.); *In re Unit Lock Co.*, 49 F. 2d 313, 316 (U.S. D.C. N.D. Okla.).

[11] *Kepner* v. *United States*, 195 U.S. 100, 125 (citing *Rouse, Hazard*); *Missouri* v. *Ross*, 299 U.S. 72, 76 (citing both *Slomka* and *Rouse, Hazard*).

the Court said: "The contention is that unpaid taxes constitute debts, and therefore fall within the seventh paragraph. But this conclusion must be rejected; for conceding that taxes are debts, they are carved out of the general provisions of paragraph (7) and put in a special class under paragraph (6), and thus fall within the rule that special provisions prevail over general ones which, in the absence of the special provisions, would control. *Townsend* v. *Little*, 109 U. S. 504, 512; *McKee* v. *United States*, 164 U. S. 287, 294; *Kepner* v. *United States*, 195 U. S. 100, 125; *In re Rouse, Hazard & Co.*, 91 Fed. 96, 101; *In re Slomka*, 122 Fed. 630, 631."

It is a rule of construction which has frequently been applied by this Court. See, *e.g.*, *Davis* v. *Pringle*, 268 U.S. 315, 318; *Ginsberg* v. *Popkin*, 285 U.S. 204; *Missouri* v. *Ross*, 299 U.S. 72, 76; *MacEvoy* v. *United States*, 322 U.S. 102, 107, and applied by this Court to bankruptcy cases involving the priority provisions of the Bankruptcy Act. *Davis* v. *Pringle, supra; Missouri* v. *Ross, supra.*

The rule should, therefore, be applied in the present case.

*The invalidity of the Board's claim apart from the applicable rule of construction.*

*The positions of the parties.* The Board argues that, because of the express limitations of the wage priority under the Bankruptcy Act, the granting of such a priority will do the employees for whom it is sought by the Board little or no good; that such employees deserve to be placed in the same economic position (and not merely the same legal position) as the other employees, who, by remaining at work, it is assumed, will have received most, if not all, of their wages, and who therefore will not be affected (at least to the same extent) by those limitations. Accord-

ingly, an additional and unlimited priority is sought as a debt owed to the United States. The Board contends that as an agency of the United States asserting a public right, as trustee for the employees, it is entitled to a priority under section 64a(5), which provides for priority to "debts owing to any person, including the United States, who by the laws of the United States in [*sic*] entitled to priority . . ."[12]

It is the position of the petitioner that the argument of "public" right should be addressed only to the interpretation of the National Labor Relations Act in order to determine whether or not the Congressional purpose to vest administration of that act in the Board is being infringed upon; that the purpose of that act as applied to unfair labor practices has here been given full scope by the Board's action in making the award, obtaining the Court of Appeal's decree of affirmance and enforcement, and by the Board's being permitted to file the proof of claim in the bankruptcy proceedings (at least without objection by the petitioner to the Board's standing to file the proof of claim); that thereafter the question of what priority should be accorded that proof is a question not of labor relations law (the National Labor Relations Act being silent as to that), but of bankruptcy law, to be determined in accordance with accepted principles of interpretation of the Bankruptcy Act; that applying such principles it is clear that proof by a governmental agency does not necessarily require priority as a debt due the Government; that the granting of such priority turns not on whether the

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[12] R.S. 3466 is to be read *in pari materia* with the Bankruptcy Act, so that debts owed the United States thereunder are entitled to priority in bankruptcy only under the fifth priority of the Bankruptcy Act, and not otherwise. *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.*, 224 U.S. 152; *United States* v. *Marxen*, 307 U.S. 200.

claimant is a public agency asserting a "public" right (if there be such a right), but on whether the claim of the agency comes within the purpose underlying the statute establishing the priority (R.S. 3466), namely, to secure adequate public revenue to sustain the public burden; that the claim of the Board does not come within the scope of that purpose; and that only by giving to the back pay award a priority as a wage claim can the purposes both of the Bankruptcy Act and of the National Labor Relations Act be fulfilled and a conflict between the two avoided.

The argument of "public" right advanced by the Board should be addressed solely to the interpretation of the National Labor Relations Act in order to determine whether or not the Congressional purpose to vest administration of that act in the Board is being infringed upon. Viewed in that frame of reference, ". . . 'private' and 'public' right, are not mutually exclusive categories, a twain bound by the legal proprieties never to meet. In the sense of the end which legal action has in view or the interests which are to be secured, there is no clear and shining line between so-called private rights enforced by individual litigants and so-called public rights enforced by . . . the National Labor Relations Board. . . ." Jaffe, "'The Public Right Dogma in Labor Board Cases," 59 Harv. L.R. 720.

The determination of the issues in the cases which have come before this Court involving the National Labor Relations Act has not hinged upon whether the right asserted fell into the classification of either public right or private right, but rather upon the Congressional purpose to vest administration of the National Labor Relations Act in the Board. Thus where that purpose would otherwise have been infringed upon, the National Labor Relations Act has been interpreted as vesting exclusive jurisdiction in the Board, to pass in the first instance on charges of unfair

labor practices,[13] and as being the only petitioner entitled to seek enforcement of a back pay award in a Court of Appeals.[14] Similarly the Board has been held to be vested with wide discretion to determine, in its own proceedings, the appropriate means to remedy unfair labor practices and to carry out the purposes of the National Labor Relations Act.[15] The cited cases were so decided, not because it was a public right which was being asserted, but basically because a degree of centralized authority and discretion has been found necessary to maintain the proper admixture of uniformity and flexibility in the administration of the Act.[16] When the Court has on occasion employed the language of "public" right and "private" right in these cases, it has done so to characterize the result achieved, once the legislative intent was determined, rather than to indicate the road to solution.[17]

Where, however, it has been evident that the Congressional purpose to vest administration of the National Labor Relations Act in the Board has not been encroached upon, the argument of public right is misdirected. Thus in *Social Security Board* v. *Nierotko*, 327 U.S. 358, it was held that a back pay award constituted wages for which the employee was entitled to credit on his individual Old

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[13] *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41. *Cf.* N.L.R.A., sec. 10(a); 29 U.S.C. sec. 160(a), 49 Stat. 449, 453, in its original form with its present form as amended by the Labor Management Relations Act, 1947, 61 Stat. 136, 146.

[14] *Amalgamated Utility Workers &c.* v. *Consolidated Edison Co.*, 309 U.S. 261.

[15] *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194; *International Association of Machinists &c.* v. *N.L.R.B.*, 311 U.S. 72, 82.

[16] See Jaffe, "The Public Right Dogma in Labor Board Cases," 59 Harv. L.R. 720, 728.

[17] *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350, 364; *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 193.

Age and Survivors Insurance Account; and in *International Union &c.* v. *Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, and in *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 218, it was held that a union which intervened in the Court of Appeals in support of a Labor Board petition had standing to seek Supreme Court review of the denial of the petition. This is seen even more clearly in a situation where another legislative policy competes with the National Labor Relations Act for the consideration of the Court. Thus the Court of Appeals for the First Circuit in *N.L.R.B.* v. *Underwood Machinery Company* (not yet reported) on July 11, 1952, rejected the Board's argument of public right in denying a petition by the Board to enjoin an employee's creditor from prosecuting a Massachusetts state court action attaching a back pay award,[18] the Court reasoning that there was no collision between the policy of the National Labor Relations Act and that of the Massachusetts statute permitting attachment of wages. See also *Nierotko* case, *supra*.[19]

In the instant case, the purpose of the National Labor Relations Act as applied to unfair labor practices has been given full scope by the Board's action in making the award, obtaining the Court of Appeals' decree of affirm-

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[18] This decision of the Court is in conflict with that of the Ninth Circuit in *N.L.R.B.* v. *Sunshine Mining Co.*, 125 F. 2d 757, upon which the Board has relied in support of its argument of public right.

[19] Since the *Nierotko* case the Board itself has recognized the individual aspects of a back pay award. ". . . the Board usually requires that the employer make the payments for State and Federal social security and similar benefits that normally would have been made during the period of the employee's discrimination." 16th Annual Report of N.L.R.B., 1951, p. 242. The Bureau of Internal Revenue, in reliance on the *Nierotko* decision, treats back pay as taxable income to the employee and requires the employer to withhold the income tax. Mim. 6060. C.B. 1946-2, 128.

ance and enforcement, and by the Board's being permitted, without objection, to file the proof of claim in the bankruptcy proceedings. Thereafter the question of what priority should be accorded that proof is a question, not of labor relations law (the National Labor Relations Act being silent as to that), but of bankruptcy law, to be determined in accordance with accepted principles of interpretation of the Bankruptcy Act.

*Proof by a governmental agency does not necessarily require priority as a debt due the Government.* The mere fact that a proof of claim is filed in a bankruptcy proceeding by a governmental agency does not in and of itself require that the claim be given priority as a debt due to the United States. *Sloan Shipyards Corp.* v. *United States Shipping Board*, 258 U.S. 549. To be entitled to such priority the claim of the agency should come within the purpose of R.S. 3466. R.S. 3466 goes back to 1797 without material amendment since that date. *Price* v. *United States*, 269 U.S. 492, 500; *United States* v. *Marxen*, 307 U.S. 200, 206; *United States* v. *Emory*, 314 U.S. 423, 428. It was enacted "to secure an adequate public revenue to sustain the public burdens . . ." *United States* v. *State Bank of North Carolina*, 6 Pet. 29, 34; *Price* v. *United States*, 269 U.S. 492, 500; *Spokane County* v. *United States*, 279 U.S. 80, 92. *United States* v. *Emory*, 314 U.S. 423, 426. Accordingly it has been held that a receiver appointed by a federal court is not entitled to priority for funds of the estate in his custody deposited with a bank. *American Surety Co.* v. *Akron Savings Bank*, 212 U.S. 557; *Florida Bank & Trust Co.* v. *Union Indemnity Co.*, 55 F. 2d 640 (C.A. 5); cert. den. 287 U.S. 600. As pointed out in the latter case, the funds belong to the creditors of the estate; the United States is not entitled to receive any part and

will not be financially harmed if the money is not paid. This result is, of course, a corollary of the proposition that the purpose of R.S. 3466 is to protect the public revenue.

Obviously a back pay award of the Board does not come within the purpose of R.S. 3466. No part of the award, if paid, will ever be covered to the Treasury of the United States. The full amount of any payment will be received by the employees. The United States has no financial interest in the award. If the award is paid, the United States will thereby receive no financial benefit; if not paid, the United States will thereby suffer no financial harm. Priority under R.S. 3466 should therefore be denied.

The Board has, however, argued that "the fact that neither the Board nor the United States ultimately retains the funds collected under the order does not affect the character of the claim as a debt due the United States," [20] citing *Bramwell* v. *United States Fidelity & Guaranty Co.*, 269 U.S. 483. The *Bramwell* case concerned a bank deposit of Indian moneys, individual and tribal, secured by a surety company bond running to the United States. The bank becoming insolvent, the surety paid the United States on the bond and then by subrogation asserted a R.S. 3466 priority against the bank. The only issue before this Court was whether a certain resolution of the board of directors of the insolvent bank amounted to a "voluntary assignment" within the meaning of R.S. 3466 and thereby brought it into operation. The question of beneficial ownership does not appear to have been presented.

In any event, the *Bramwell* case is unique [21] and rests on the Indian's special status as a ward of the United

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[20] Brief for the National Labor Relations Board in Opposition to Petition for Certiorari, p. 6.

[21] Note, "Priority of the 'United States' Against Insolvent Debtors," 47 Columbia L.R. 485.

States. *United States* v. *Oklahoma*, 261 U.S. 253, 256; *United States* v. *Kagama*, 118 U.S. 375, 383, 384. See also the District Court opinion in the *Bramwell* case, *sub nom. United States Fidelity & Guaranty Co.* v. *Bramwell*, 295 F. 331 (U.S. D.C. Ore.). The National Labor Relations Board, however, ". . . is not made either guardian or ruler over the employees . . ." *Humble Oil & Refining Co.* v. *N.L.R.B.*, 113 F. 2d 85, 88 (C.A. 5); *E. I. DuPont de Nemours & Co.* v. *N.L.R.B.*, 116 F. 2d 388, 398 (C.A. 4). Indeed, if it could at any time have been said that the Government did add its authority to the collective bargaining efforts of employees, the Labor Management Relations Act, 1947 [22] (the "Taft-Hartley Act," so called), is a departure from that position. "The Taft-Hartley amendments represent an abandonment of the policy of affirmatively encouraging the spread of union organization and collective bargaining . . . a new balance is achieved by imposing corresponding obligations on labor organizations. *The Government, instead of aiding one side, now stands in the center.*" (Emphasis added.)[23]

R.S. 3466 does not stand alone when being construed. It always is to be considered with reference to the collateral legislation from which the claim to priority originates. *United States* v. *Marxen*, 307 U.S. 200, 206. When so considered, if the intent or purpose of that legislation appears to be inharmonious with the purpose of R.S. 3466, the priority sought will be denied. Thus in *Cook County National Bank* v. *United States*, 107 U.S. 445, the Government was denied such priority against an insolvent national bank, it being evident that the act authorizing the formation of national banks constituted a complete state-

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[22] Public Law No. 101, 80th Cong. 1st Sess., 61 Stat. 136.

[23] Cox, "Some Aspects of the Labor Management Relations Act, 1947," 61 Harv. L.R. 1, 44.

ment of all national bank obligations, including the obligations arising out of deposits of public moneys. Similarly in *Mellon* v. *Michigan Trust Co.*, 271 U.S. 236, a claim admittedly due the United States under the Federal Control Act governing the operation of the railroads in World War I was denied priority in an equity receivership in view of the evident purpose of that act to treat the government as if it were the railroad itself. And see *United States* v. *Guaranty Trust Co.*, 280 U.S. 478, denying priority to a claim due the United States under the Transportation Act of 1920.

Applying these considerations to a back pay award, as did the Court of Appeals in the *Killoren* case, it is evident that, so far as concerns the National Labor Relations Act, the purpose of such an award requires that the claim be accorded priority under section 64a(2) as a debt for wages due to the employees and conflicts with the granting of priority to the claim under section 64a(5) as a debt due to the United States. As stated by that Court (p. 613): ". . . As to the employee at least, it [a back pay award] is, in a practical and sound legal sense, nothing more or less than wages. It is compensation to which he is entitled, by reason of his continued status under the Act as an employee, and which the Act and the order of the Board regard him as having constructively earned. The language of the Act specifically denominates it 'back pay'. It ought not therefore, equitably or in the spirit of the Act, to be given either a superior or a subordinate legal position to the wages of other regular employees, if there is any sound way to avoid doing so. To elevate it, for any purpose, above the corresponding rights of other employees would hardly tend to further industrial peace, which is the fundamental aim of the National Labor Relations Act. Similarly, to place it on a level in any degree lower than that of regular wage rights would deny it the position to

which its denomination in the Act entitles it, and would dilute the equalizing purpose for which it was intended."

On the other hand, so far as concerns the Bankruptcy Act, it is equally evident that only by granting the back pay award priority as a debt for wages due to the employees, and by denying it priority as a debt due to the United States can the fundamental purpose of that act be achieved, and conflict with that purpose be avoided.[24] ". . . the theme of the Bankruptcy Act is equality of distribution." *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U.S. 215, 219; Bankruptcy Act, sec. 65a. All priority creditors of the same class must, of course, be treated alike. The Bankruptcy Act makes no differentiation among those seeking the same class of priority. See *Missouri* v. *Ross*, 299 U.S. 72. No claimant for a priority in bankruptcy is afforded any better or worse treatment than any other claimant of that class. It was in recognition and implementation of this fundamental purpose of the Bankruptcy Act that the Court of Appeals in the *Killoren* case declared (p. 613): "Any sound consideration of the question of priorities must therefore have regard for the position and rights of all employees in the bankruptcy situation . . . If a back pay allowance is not to have the advantage, with other wage claims, of the second priority, it necessarily is in an unequal position as to the amount for which this high preference is allowed by the Bankruptcy Act. On the other hand, if there are unpaid wage claims beyond the amount of such a preference, other employees with the status of mere general creditors as to their remaining balances, would be prejudiced by

[24] It must be emphasized that we are here dealing with a bankruptcy question in a bankruptcy proceeding in the course of the administration of the assets of a bankrupt estate by the Bankruptcy Court, and not with the question of an unfair labor practice in a proceeding before the Board.

having back pay allowances paid in full as debts due the United States in the fifth priority." [25]

The effect upon general creditors of the granting of a priority under 63a(5) should not be overlooked. In the distribution of a bankrupt estate we are, after all, concerned not only with those favored few to whom payment "in advance of the payment of dividends to creditors" [26] has been accorded by legislative policy, but also with equitable distribution of the assets of the estate among all creditors of the bankrupt. Any extension of priority payments necessarily diminishes their distributive share. The lot of the general unsecured creditor today with the increase in number and amount of the "taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof" entitled to priority [27] is truly not a happy one. These are the people to whom the bankrupt is indebted for the goods and services they have supplied him. Among them is to be divided the residue of the estate after the satisfaction of the claims of secured creditors,[28] costs and expenses of administration of the estate in bankruptcy,[29] wages,[30] taxes [31] and debts owed to the

[25] The Court went on to point out that (as in the instant case) "The record does not indicate anything as to the amount of wage claims that have been filed in the present proceeding, or as to the value of the estate. In searching for the sound general principle, however, that should govern such a situation, we necessarily are not so much concerned with the facts of an individual case, as with the realities and probabilities of the field as a whole. We are of the opinion that a back pay allowance should accordingly be treated the same as any regular wage claim, for bankruptcy purposes, . . ." (p. 614).

[26] Bankruptcy Act, sec. 64b, 11 U.S.C. sec. 104(b).

[27] Id., sec. 64a(4), 11 U.S.C. sec. 104(a)(4).

[28] Id., sec. 65a, 11 U.S.C. sec. 105(a).

[29] Id., sec. 64a(1), 11 U.S.C. sec. 104(a)(1).

[30] Id., sec. 64a(2), 11 U.S.C. sec. 104(a)(2).

[31] Id., sec. 64a(4), 11 U.S.C. sec. 104(a)(4).

United States.[32] The intrusion of a novel priority must of necessity lessen *pro tanto* the fund to which they may look for such dividend as may be payable to them. It must necessarily derogate in like measure from the achievement of the primary object of the Bankruptcy Act: equality of distribution.

## Conclusion.

For the foregoing reasons the judgments below should be reversed.

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[32] Bankruptcy Act, sec. 64a(5), 11 U.S.C. sec. 104(a)(5).

## Appendix.

I. The pertinent provisions of the Bankruptcy Act (11 U.S.C. secs. 1 *et seq.*) are as follows:

Section 63 (11 U.S.C. sec. 103):

"*Debts which may be proved.*

"(a) Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; . . . (4) an open account, or a contract express or implied; . . ."

Section 57 (11 U.S.C. sec. 93):

"*Proof and allowance of claims.*

"(d) Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion; *Provided, however*, That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay

the administration of the estate or any proceeding under this Act."

Section 64 (11 U.S.C. sec. 104):

"*Debts which have priority.*

"(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . (2) wages not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen . . . (5) debts owing to any person, including the United States, who by the laws of the United States i[s] entitled to priority . . ."

Section 1 (11 U.S.C. sec. 1):

"*Meaning of words and phrases.*

. . . . . .

"(9) 'Court' shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending; . . ."

Section 2 (11 U.S.C. sec. 11):

"*Creation of courts of bankruptcy and their jurisdiction.*

"(a) The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exer-

cise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to— . . .

. . . . . .

"(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; . . ."

Section 38 (11 U.S.C. sec. 66):

"*Jurisdiction of referees.*

"Referees are hereby invested, subject always to a review by the judge, with jurisdiction to . . . (6) perform such of the duties as are by this Act conferred on courts of bankruptcy, including those incidental to ancillary jurisdiction, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; . . ."

II. Revised Statutes, 3466 (31 U.S.C. sec. 191) reads as follows:

"*Priority established.*

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an

absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

III. The pertinent provisions of the National Labor Relations Act (29 U.S.C. sec. 151 *et seq.*) are as follows:

Section 10(c) (29 U.S.C., Supp. V, sec. 160(c)):

"PREVENTION OF UNFAIR LABOR PRACTICES

. . . . . .

". . . where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: . . ." (61 Stat. 136, 147.)

Section 10(d) (29 U.S.C., Supp. V, sec. 160(d)):

"Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it." (61 Stat. 136, 147.)